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No. 03-1500

IN THE

Supreme Court of the United States

THOMAS VAN ORDEN,
Petitioner,

v.

RICK PERRY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE COUNCIL FOR SECULAR HUMANISM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER THOMAS VAN ORDEN

EDWARD TABASH *
LAW OFFICES OF EDWARD TABASH
8484 Wilshire Boulevard, #850
Beverly Hills, CA 90211
(323) 655-7506

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether a large monument, 6 feet high and 3 feet wide, presenting the Ten Commandments, located on government property, between the Texas State Capitol and the Texas Supreme Court, is an impermissible establishment of religion in violation of the First Amendment.

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BRIEF OF THE COUNCIL FOR SECULAR HUMANISM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER THOMAS VAN ORDEN

INTEREST OF THE *AMICUS CURIAE*

The Council for Secular Humanism (hereinafter "Council") is a non-profit educational organization based in Amherst, New York, with affiliates all over the United States and the world. The Council is the largest organization in the world representing the interests of nonbelievers.[1]

[1] This brief is filed with the consent of the parties, and letters evidencing such consent have been filed with the Court. Pursuant to Rule 37.6, *Amicus* certifies that no counsel for a party authorized this brief in whole or in part and that no person or party other than the *Amicus* or its counsel has made a monetary contribution to this brief's preparation or submission.

The growth of the Council reflects just one aspect of the increasing diversity of religious and nonreligious beliefs in this country. There are many Americans, in addition to atheists, who do not believe in the Biblical deity glorified in the Ten Commandments. There are Buddhists and Taoists who have no single supreme being. There are Hindus who believe in a pantheon of deities. There are Muslims who do not regard the Biblical deity as their appropriate object of worship but rather favor the Quranic Allah. The placing of the Ten Commandments on public property, particularly in government centers that are the seats of power for a state, as is the case here, relegates all these Americans to second-class citizenship.

The Council is concerned that no nonbeliever and no member of a religious minority ever suffer a sense of outsider status as a consequence of a government display of a religious symbol on public property, particularly public property that represents the center of government for the nation, a state, or a given locality. To claim that the Ten Commandments is not a religious expression is to avoid the logic of what it says. To place it on public property, on government property that constitutes the locus of a state's government, is for that state to communicate outsider status to religious dissenters and to atheists.

SUMMARY OF ARGUMENT

Since 1947, this Supreme Court has consistently held that no branch of government can in any way favor religious belief or religious believers over nonbelief or nonbelievers. Most recently, this Court has held that no branch of government may communicate the message to anyone that because of either accepting or rejecting any religious belief "they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-310 (2000), quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

Displaying the Ten Commandments at a crucial physical location on state seat-of-government grounds, so as to convey that the Decalogue is an integral founding component of the state's legal system, does favor belief over nonbelief and does communicate to those who do not believe in Biblical religion that they are outsiders.

This Court has already defined the Ten Commandments as a religious expression, and thus the State of Texas cannot constitutionally convey the impression that it endorses these Commandments.

This Court has, in recent years, denied *certiorari* and refused to disturb or alter, in any way, the result in three other cases, from the 6th, 7th, and 11th Circuits, respectively, in which each such Circuit found a Ten Commandments display unconstitutional in circumstances virtually identical to the instant case.

The location of this Ten Commandments monument in a strategic position on state seat-of-government grounds, on a straight line between the Legislature, Governor's offices, and the Texas Supreme Court, impermissibly conveys the impression that the state endorses the Decalogue as undergirding the Texas legal system.

The display of the Ten Commandments, at issue here, entails state action that does not have a secular purpose, that has a primary purpose of advancing religion, and that excessively entangles government with the promotion of religious beliefs.

If this Court allows such an overt linkage of a state's legal system with a religious mandate, then this Court will have to address exactly what, if any, are the rights that believers have in our country that nonbelievers don't have. This could open the door to tremendous civil strife. If the government can in

any way favor the believer more than the nonbeliever, or the Bible believer more than a member of some religious minority, there is then the ominous shadow of shunting the nonbeliever or religious dissenter into second-class citizenship, which, itself, would signify the onset of religious tyranny.

Amicus thus asks this Honorable Supreme Court to reverse the decision of the 5th Circuit and thereby compel the State of Texas to remove the Ten Commandments monument at issue in this case.

ARGUMENT

I. NO BRANCH OF GOVERNMENT CAN FAVOR THE BELIEVER OVER THE NONBELIEVER.

This Court has always required government bodies, at all levels, to refrain from exhibiting any favoritism toward belief over nonbelief and from showing any favoritism toward believers over nonbelievers. One of the best expressions of this unbroken line of holdings by this Court is:

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine and practice. It may not be hostile to any religion or to the advocacy of no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.

Epperson v. Arkansas, 393 U.S. 97, 103-104 (1968).

The language in this quote from *Epperson* requires strict government neutrality in matters of religion. The concept of God and God's supposed Commandments to people is a religious notion. For government bodies to place replicas of the Ten Commandments on government seat-of-power property, as is the case here, is for government to favor belief over

nonbelief. The Ten Commandments can be divided up many ways. In their original form, at least as set forth in *Ex 20: 2-17*, there are sixteen Commandments, and a total of twenty five individual instructions. Of these, the first ten deal strictly with religious worship as God supposedly wants to be worshiped. Even when they are condensed down to ten for the popularized version that appears on public property in all cases and controversies that come before our courts, at least four of them are mandates for how God allegedly demands to be viewed and worshiped.

Government bodies do not preserve their required neutrality between religion and nonbelief when they display edicts that demand no other Gods before the Biblical God, the refraining from making graven images, not taking God's name in vain, and observance of the Sabbath.

Government bodies also violate their required neutrality between and among religions when they choose one version of the Ten Commandments over the other, that is, if they pick either *Ex 20: 2-17* or *Deut 5: 6-21*. Also, various religions group the total of twenty five instructions differently in order to come up with ten. Thus, even among Bible-based religions, the lack of agreement among various divisions of Christianity and Judaism makes it very difficult to reach a consensus about how the total of ten should be reached.

Again, government bodies are not just prohibited from favoring one religion over another, they are also prohibited from favoring religion, generally, over nonbelief, *Epperson*, supra.

As Justice Souter pointed out in his thorough concurring opinion in *Lee v. Weisman*, 505 U.S. 577 (1992), the Framers of the Bill of Rights, including the Members of Congress in 1789, repeatedly considered and rejected language that would have allowed government to aid all religions, even if no preference or favoritism were shown to any one over any

other. Rather, the Framers of the First Amendment intended to prohibit government support or favoritism for religion in general. As Justice Souter points out, James Madison, the initial principal author of the First Amendment, had only a few years earlier collaborated with Thomas Jefferson in the composition of the Virginia Statute for Religious Freedom, in which all nonpreferential aid to religion, in general, was rejected, 505 U.S. at 615.

The version of the First Amendment that emerged from the House read that Congress shall make no law establishing Religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed. 505 U.S. at 613. However, what finally emerged in September of 1789, after a joint conference between the House and Senate, was the actual language, now in force, that there shall be no law "respect ing an establishment of religion." 505 U.S. at 614. Justice Souter comments that it is remarkable that the final language rejected all earlier language that only prohibited laws establishing a national religion. *Id.* The final language prohibits all laws that even respect any establishment of religion.

This was in keeping with an entire constitutional scheme, starting with the drafting of the original Constitution in 1787, in which the nonbeliever was to suffer no legal disabilities or impediments because of rejecting any aspect of religious belief. Evidence of this is that the only reference to religion in the Constitution, prior to even the enactment of the Bill of Rights, was a negative one. *Article VI, Clause III* prohibits any religious test for public office. This was the first time in history that a sovereign nation had prohibited itself from imposing any minimum profession of faith, in any form, as a precondition to eligibility for public office.

Not only did James Madison, again the initial principal author of the First Amendment, collaborate with Thomas Jefferson in the drafting of the Virginia Statute for Religious Freedom, in 1785 he wrote his *Memorial and Remonstrance*

Against Religious Assessments, protesting a plan by the State of Virginia to assess a tax on the public for the support of all ministers. *James Madison on Religious Liberty*, Robert S. Alley, editor, Prometheus Books, Buffalo, New York, 1985, pages 55-60. This is further evidence that Madison approached the crafting of the First Amendment with the objective of preventing government from supporting all religions. Madison wanted government to support no religion whatsoever.

The debates to ratify the original Constitution took place after it was written in 1787 and before Madison's introduction of the First Amendment in 1789. The most crucial public commentary in urging ratification occurred in *The Federalist Papers*. In *Federalist No. 52*, Madison wrote approvingly that the door to holding office in the new national government will be open to "merit of every description . . . without regard to . . . any particular profession of religious faith." *The Federalist Papers*, The New American Library, New York, 1961, page 326.

Another crucial insight into Madison's thinking, in light of his being the initial principal author of the First Amendment, can be gleaned from his writings after leaving the presidency. In his *Detached Memoranda*, written in 1817, Madison expressed his disapproval of presidential proclamations of thanksgiving, and tax-supported chaplains for Congress and the armed services. "Madison's Detached Memoranda," ed. Elizabeth Fleet, *William and Mary Quarterly 3* (1946) 554-559.

Surely Madison, with guidance and input from Jefferson, wanted to establish a governmental system in which the official powers of the nation could not favor religion even generally. This point is even more powerfully bolstered by the above reference to Justice Souter's chronicling of how remarkable it was that the House and Senate ultimately went even beyond Madison's initial wording and wrote the final

First Amendment language with words that are even stronger in favor of government neutrality in matters of religion than was reflected in the version that first passed the House.

Thus, the cumulative effect of the strict separationist views of Jefferson, Madison, the No Religious Test Clause in the original Constitution, and the strengthening of Madison's initial language by the First Congress in 1789 all argue quite powerfully that the Founders intended to establish a constitutional system in which belief could not be favored over nonbelief.

A further example of how scrupulously the First Congress made sure that government did not in any way push or promote religious beliefs and that such beliefs should be entirely up to the individual, without even a hint of any government approval or disapproval of anyone's views on matters of religion, is apparent in the magnificent statement by a member of the House during Congress's consideration of the First Amendment. On August 15, 1789, Daniel Carroll said: ". . . the rights of conscience are, in their nature, of peculiar delicacy, and will little bear even the gentlest touch of governmental hand . . ." *Church and State in the United States*, Anson Phelps Stokes and Leo Pfeffer, Harper & Row, New York (1964), page 94.

Armed now with the concept that government cannot favor belief over nonbelief, it becomes quite clear that to say that the Ten Commandments are not an expression of religious beliefs is to violate all common understanding of the use of language. As has already been shown above, the first four Commandments are exclusively edicts of religious worship. Yet, in the instant case, the State of Texas did not delete these four from its display. Accordingly, the state has promoted the religious beliefs of no God before the Biblical God, the refraining from making graven images, not taking the Lord's name in vain, and keeping the Sabbath day holy. The State of Texas cannot constitutionally promote any of these concepts

by displaying them on government property. As this Court has repeatedly said:

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person to "profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against nonbelievers.

Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

The language from *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 309-310, quoted in the above SUMMARY OF ARGUMENT, that no branch of government may ever communicate to anyone that because of either accepting or rejecting any religious belief, they are outsiders and not full members of the political community, is thoroughly contravened if any branch of government can display the Ten Commandments as a foundation of its governing laws. This automatically transforms nonbelievers and members of religious minorities into outsiders, and communicates to them that their government deems its legal underpinning to be grounded in the edicts of the Biblical God.

II. SINCE NO BRANCH OF GOVERNMENT CAN FAVOR BELIEF OVER NONBELIEF, NO BRANCH OF GOVERNMENT CAN CONVEY THE IMPRESSION THAT THE TEN COMMANDMENTS ARE A GUIDING LIGHT FOR THE GOVERNING LEGAL SYSTEM.

The above section has demonstrated that no branch of government can favor the believer over the nonbeliever and that no branch of government can communicate to nonbelievers or religious minorities that they are less a part of the political community than believers. To the extent that acknowledging any religious heritage means that government, even by implication, sides with those who believe in God, against those who don't, that branch of government has

violated the First Amendment. This Court has repeatedly held that no branch of government can "aid one religion, aid all religions, or prefer one religion to another." *Everson v. Board of Education of Ewing Tp.*, 330 U.S. 1, 15 (1947).

In the Circuit Court opinion below, which *Amicus* urges this Court to reverse, the majority opinion stated that the Ten Commandments display, located between the State Capitol and the Texas Supreme Court, is to be interpreted by a reasonable viewer "as a recognition of the large role of the Decalogue in the development of Texas law." *Van Orden v. Perry*, 351 F.3d 173, 177 (5th Cir. 2003). It is constitutionally impermissible for the State of Texas to declare that not putting any Gods before the Biblical God, not making graven images, not taking the Lord's name in vain, and observance of the Sabbath are all major pillars of that state's legal system. Government actions that favor religious believers over nonbelievers are unconstitutional. *City of Boerne v. Flores*, 521 U.S. 507, 537 (1997) (Stevens, J., concurring.)

The 5th Circuit went on to state that the Ten Commandments have a secular dimension as well as a religious meaning. *Van Orden*, 351 F.3d at 179. This is precisely the problem. There is a religious meaning which renders the display unconstitutional. The State of Texas would have a better chance of passing constitutional muster if it deleted all the Commandments that give orders for religious observance and that delineate the proper way to interact with God. Even if there is a secular dimension to admonitions against killing and stealing, this does not allow any branch of government to showcase the notion of having no Gods before the Biblical God as being an integral part of the development of the governing legal system.

III. THIS UNITED STATES SUPREME COURT HAS ALREADY SPOKEN DEFINITIVELY ON THE RELIGIOUS NATURE OF THE TEN COMMANDMENTS AND HOW, AS A TOTALITY, THE SECULAR DIMENSION CANNOT BE EXCISED FROM THE DECALOGUE'S RELIGIOUS CHARACTER.

This Court has unambiguously said:

> The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of supposed secular purpose can blind us to that fact.

Stone v. Graham, 449 U.S. 39, 41 (1980).

This contradicts the position of the 5th Circuit in the opinion below. This Supreme Court recognized that the religious character of the totality of the Commandments is indelible and that, taken as a whole, the secular cannot be severed from the sacred. This very Court then went on to even more powerfully make the point:

> The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. *See* Exodus 20: 12-17; Deuteronomy 5: 16-21. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God, alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. *See* Exodus 20: 1-11; Deuteronomy 5: 6-15.

Stone, 449 U.S. at 41-42.

Accordingly, unless the State of Texas deletes those elements of the Commandments that concern the religious duties of believers, the display on government property, at the very seat of state government, is the promotion of the religious points of view contained within the Commandments-taken as a whole-and is thus unconstitutional.

IV. THIS UNITED STATES SUPREME COURT HAS RECENTLY LET STAND THREE CIRCUIT COURT OF APPEALS CASES, IN WHICH THE RESPECTIVE CIRCUITS, 6TH, 7TH, AND 11TH, HAVE HELD UNCONSTITUTIONAL DISPLAYS OF THE TEN COMMANDMENTS ON GOVERNMENT SEAT-OF-POWER PROPERTY, UNDER CIRCUMSTANCES VIRTUALLY IDENTICAL TO THE INSTANT CASE.

In *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001), *cert. denied,* 534 U.S. 1162 (2002), a display of the Ten Commandments on the grounds of the Indiana Statehouse was held to be a violation of the Establishment Clause. In *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002), *cert. denied,* 123 S.Ct. 1009, 155 L.Ed. 2d 826 (2003), a display of the Ten Commandments on the grounds of the Kentucky State Capitol was held to be a violation of the Establishment Clause. In *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003), *cert. denied*, 124 S.Ct. 497, 157 L.Ed. 2d 404 (2003), a display of the Ten Commandments in the Alabama State Judicial Building was held to be a violation of the Establishment Clause. This Supreme Court refused to review or alter in any way each of these three Circuit Court of Appeals decisions. The one characteristic that each of these three cases have in common with each other, and have in common with the instant case, is that they all involve displays of the Ten Commandments on public property that is also a state government seat of executive, legislative, or judicial power.

When a state government chooses to display the Ten Commandments, consisting of such religious mandates as exclusive worship of the Biblical God and observance of the Sabbath as holy, on property that contains the highest offices of that state's government, the state conveys a constitutionally impermissible impression of endorsing the substance,

including the purely religious edicts, of the Commandments. Conveying such an impression of endorsement is prohibited by the precedents of this Court. *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 597-598 *footnote 47* (1989).

V. WHEN VIEWED IN ITS TOTALITY, THE EMPLACEMENT OF THE TEN COMMANDMENTS AT A POINT ON A DIRECT LINE BETWEEN THE LEGISLATURE, GOVERNOR'S OFFICE, AND TEXAS SUPREME COURT, CONSTITUTES AN IMPERMISSIBLE IMPRESSION THAT THE STATE OF TEXAS ENDORSES ALL OF THE TEN COMMANDMENTS AS A RELEVANT CODE THAT UNDERGIRDS THE STATE'S LEGAL SYSTEM.

There is no dispute that the Ten Commandments display at issue here is on a direct line, on state seat-of-government grounds, between the buildings that house the legislative, executive, and judicial branches of the government of the State of Texas, *Van Orden*, 351 F.3d at 181. Texas argues that this is no more significant than if the Decalogue were placed in a museum setting. 351 F.3d at 180. However, the state then immediately contradicts itself when the executive director of the Texas State Preservation Board, in uncontroverted testimony at trial, explained that the location was carefully chosen by the Board's professional staff to reflect the role of the Commandments in the making of law. 351 F.3d at 181. This obviously contradicts the attempt to portray the display as being as devoid of state endorsed religious content as if it were deposited in some museum.

Also, the state's reliance on its claim that the Decalogue played an important historical role in the development of the state's legal system does not survive Establishment Clause scrutiny, because the requirement of government neutrality in matters of religion does not permit any branch of government to declare that its legal system is bound up with religious

decrees. Government bodies cannot get around this by claiming that the intertwinement of their legal system and such religious edicts are a matter of history. This Court has specifically held that a historical nexus between government and religious doctrines cannot legitimize government support, promotion, or endorsement of any such religious doctrine. *Allegheny County*, 492 U.S. at 603.

In *Adland*, *supra.*, 307 F.3d 471, the 6th Circuit struck down a Ten Commandments display on Kentucky state capitol grounds, as violating the Establishment Clause under circumstances remarkably similar to the situation in the instant case. In *Adland*, 307 F.3d at 475, the Ten Commandments was a gift to the state by the Fraternal Order of Eagles, the same as in the instant case, *Van Orden*, 351 F.3d at 176. Both monuments are the same size, six feet high and a little under four feet wide. *Adland*, 307 F.3d at 475; *Van Orden*, 351 F.3d at 176. Both have an American eagle grasping the American flag. Both have two small tablets containing ancient Hebrew script. Both have two small stars of David. Both have symbols representing Jesus Christ in the form of two Greek letters, Chi and Rho, superimposed on each other. *Adland*, 307 F.3d at 476; *Van Orden*, 351 F.3d at 176.

The 6th Circuit in *Adland* correctly found that the display of the Ten Commandments on grounds that are "the seat of government is so plainly under government ownership and control that every display on its property is marked implicitly with government approval." 307 F.3d at 486. Since the display at issue here is on a direct line between the legislative, executive, and judicial offices of Texas state government, *Van Orden*, 351 F.3d at 181, the 5th Circuit erred in its decision to allow the continued presence of this monument.

As shown above, in both virtually identical monuments, in *Adland* and in the instant case, there is an American eagle gripping the American flag at the top of the Ten Commandments display. The 5th Circuit, below, ignored this. However, the 6th Circuit correctly determined that this aspect of the monument "serves to heighten the appearance of government endorsement of religion. *Adland*, 307 F.3d at 487.

Even though both monuments were situated in a physical location in which other displays are close by, each Ten Commandments display stands out on the state-seat-of-government grounds of respectively, Kentucky and Texas. What the 6th Circuit said in *Adland* is what the 5th Circuit, below, should have said:

> In this case, the religious symbol, the Ten Commandments, is the predominant element in the display. Accordingly, a reasonable observer is likely to believe that the religious message of the Ten Commandments is the dominant message of the display.

Adland, 307 F.3d at 487.

In the instant case, there is nothing to show that the disparate monuments and displays on Texas-seat-of-government grounds are in any way part of an overall scheme or display. Each such display, as in *Adland*, seems to be free standing. The 5th Circuit made the wrong decision. The 6th Circuit made the right decision in holding:

> Without a unifying theme to hold the display together, a reasonable observer could only view the monuments separately. If a reasonable observer views the monuments separately, unconnected by a common context, his or her attention is naturally drawn to the Ten Commandments monument, the largest monument in the display, and its accompanying religious message.

Adland, 307 F.3d at 488.

Another area of crucial similarity between *Adland* and the instant case is that in both, the Ten Commandments monuments in question were moved to positions of more central prominence on the respective state seat-of-government

grounds after each had been situated for at least thirty years in a location other than the one to which it was to be moved, when each respective lawsuit was brought. In *Adland*, the Decalogue was to be relocated near Kentucky's floral clock in order to remind residents of the state of the Biblical foundations of their laws. 307 F. 3d at 475. In the instant case, the Decalogue was first situated in 1961, *Van Orden*, 351 F.3d at 176, and then moved to its present location on capitol grounds in 1993—at the point on the direct line between the Legislature, Governor's office, and Texas Supreme Court—in order to reflect the role of the Ten Commandments in the making of the state's governing laws. 351 F.3d at 181. Since the *Adland* Court found such a positioning to be unconstitutional, so should have the *Van Orden* Court below. Since this Supreme Court denied *certiorari* and thereby refused to disturb the holding in *Adland*, this Supreme Court is now respectfully requested to reverse the 5th Circuit in the instant case, so that, at the very least, the constitutionally correct decision in *Adland*, which this Supreme Court refused to modify in any way, will now clearly prevail.

In *Indiana Civil Liberties Union*, *supra.*, 259 F.3d 766, the 7th Circuit struck down a Ten Commandments display on Indiana state capitol grounds as violating the Establishment Clause, under circumstances again remarkably similar to the circumstances in the instant case. In a lawsuit to stop the emplacement of a Ten Commandments monument on state capitol grounds in Indianapolis, the 7th Circuit held that because the state "had not shown a historical link between most of the Ten Commandments and the ideals of government and the legal system," the monument was a religious display. 259 F.3d at 770. The 7th Circuit was correct in declaring this to be a constitutional defect. Yet, the 5th Circuit erroneously did not recognize an identical First Amendment violation in the Texas monument's serving "as a

recognition of the large role of the Decalogue in the development of Texas law." *Van Orden*, 351 F.3d at 177.

The 7th Circuit recognized that if the totality of the Ten Commandments are displayed, including the mandates to worship only the Biblical God, to avoid idolatry, to not take the Lord's name in vain, and to observe the Sabbath, the Decalogue is definitely then "a religious and sacred text that transcends secular ethical and moral concerns." *Indiana Civil Liberties Union*, 259 F.3d at 770. The 7th Circuit went on to recognize that duty-to-God Commandments "are wholly religious in nature, and serve no secular function." 259 F.3d at 770-771. The 7th Circuit also held that even the display of secular texts along with the Decalogue does not automatically lead to a finding that the purpose in erecting the monument is primarily secular. *Indiana Civil Liberties Union*, 259 F.3d at 771.

The 7th Circuit recognized that the Ten Commandments are still an inherently religious text and are a code that focuses on subjects "that are beyond the ken of any government and that address directly the relationship of the individual human being to God." 259 F.3d at 771. In *Indiana Civil Liberties Union*, the 7th Circuit recognized that displays of the Ten Commandments in the form of monuments such as the one at issue in the instant case, unconstitutionally sends a message "sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval of their individual religious choices." 259 F.3d at 772.

In the instant case, the State of Texas makes the argument that the Ten Commandments monument at issue here is displayed in a museum setting so as to substantially dilute any active message of government endorsement of any religious message. *Van Orden*, 351 F.3d at 180. In *Indiana Civil Liberties Union*, the State of Indiana attempted to make the identical argument that the museum-like setting of the display

neutralized any claim that the state was endorsing a religious message. 259 F.3d at 772. However, the 7th Circuit correctly responded to this in a manner directly transferrable to the present case now before this Supreme Court:

> But this is not simply some museum nestled in some secluded park. The grounds which house, among other things, the Capitol, the Governor's office, the General Assembly, the Indiana Supreme Court, and the Indiana Court of Appeals, is the seat of Indiana government. We subject to particularly careful scrutiny displays at the seat of government.

Id.

This is identical with the emplacement of the Ten Commandments monument in the instant case on the direct line between the Texas Legislature, Governor's Office, and Texas Supreme Court. *Van Orden*, 352 F.3d at 181. The identical reasoning by the 7th Circuit, quoted above, to strike down the claim of the State of Indiana, that it's proposed Ten Commandments monument display at the seat of government is rendered constitutionally innocuous because of some museum-like setting, is applicable in full force to defeating the exact same claim made here by the State of Texas.

In *Glassroth,* supra., 335 F.3d 1282, the 11th Circuit upheld the Federal District Court's order that the Chief Justice of Alabama remove a Ten Commandments monument from the Alabama State Judicial Building. The 11th Circuit correctly noted that the location of the monument gave an onlooker "the sense of being in the presence of something not just valued and revered (such as an historical document) but also holy and sacred." 335 F.3d at 1286. This is also applicable to the location of the Texas monument, at issue here, which is intentionally situated in order to be integral to the physical line between the buildings that house the three main branches of Texas state government. *Van Orden*, 351 F.3d at 181.

The 11th Circuit concluded that a reasonable observer would find nothing on the monument in the Alabama State Judicial Building to de-emphasize its religious nature. 335 F.3d at 1297. There is likewise nothing on the Texas monument, at issue here, that would de-emphasize its religious nature.

Again, this Supreme Court's denial of *certiorari* and concomitant refusal to disturb or alter, in any way, the decisions of the 6th, 7th, and 11th Circuit Courts of Appeals in cases virtually identical to the instant case, powerfully argues for the reversal of the 5th Circuit here in *Van Orden*. Such a reversal would then eliminate the conflict between the 6th, 7th, and 11th Circuits on the one hand, and the 5th Circuit on the other. Reversing the 5th Circuit in the instant case is also mandated by this Supreme Court's Establishment Clause precedents.

VI. THE TEN COMMANDMENTS DISPLAY AT THE TEXAS SEAT OF GOVERNMENT DOES NOT HAVE A SECULAR PURPOSE. IT HAS THE EFFECT OF ADVANCING RELIGION. IT ALSO FOSTERS AN EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION.

The 5th Circuit, below, was right in holding that the tripartite inquiry of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) is still "a required staring point in deciding contentions that state displays of symbols and writings with a religious message are contrary to the First Amendment." *Van Orden*, 351 F.3d at 177. The 6th Circuit was correct in deeming the *Lemon* tests to still apply until this Supreme Court "explicitly overrules or abandons it." *Adland*. 307 F.3d at 479. *Lemon* was correctly applied by the 7th Circuit in *Indiana Civil Liberties Union* 259 F.3d at 770. It was also applied correctly by the 11th Circuit in *Glassroth*, 335 F.3d at 1295. Thus, the 6th, 7th, and 11th Circuits all correctly applied *Lemon* to strike down Ten Commandment monuments on state seat-of-

government property. The 5th Circuit correctly joined the other three Circuits in recognizing the continued relevance of the *Lemon* analysis, but was wrong and alone, among the four Circuits, in finding that none of the *Lemon* tests were violated.

In order to be constitutional, government action must have a secular purpose. As already demonstrated in this *Amicus Brief*, the inclusion of the religious edicts of the Ten Commandments does not allow for the separating of the secular from the religious message of the Commandments. Thus, the display violates the 1) requirement that all government action have a secular purpose. *Lemon,* 403 U.S. at 612. The display and the positioning of the display in its strategic location in a direct line between the Legislature, the Executive Offices of the Governor, and the Texas Supreme Court, *Van Orden,* 351 F.3d at 181, has the primary effect of advancing religion, since it is a religious display containing the Commandments pertaining to how one is to worship God and keep the Sabbath. Texas therefore violates the 2) requirement that no government action have the principal or primary effect of advancing religion. *Lemon,* 403 U.S. at 612.

Because of the religious message of the Ten Commandments display and its physical location central to the main branches of state government, at the seat of state government, it constitutes the State of Texas' 3) excessive entanglement with religion, which is constitutionally impermissible. *Lemon* 403 U.S. at 613.

All three of the *Lemon* tests are therefore violated by the Ten Commandments monument on display on state seat-of-government grounds in Austin, Texas.

VII. IF THIS COURT UPHOLDS THE TEN COMMANDMENTS DISPLAY BY THE STATE OF TEXAS AT THE SEAT OF POWER OF STATE GOVERNMENT, THE COURT WILL THEN HAVE TO DEFINE THE EXACT PARAMETERS OF THE EXTENT TO WHICH GOVERNMENT CAN FAVOR BELIEVERS OVER NONBELIEVERS.

Throughout this Brief, *Amicus* has clearly shown that this Supreme Court, by its own words, insists on a society in which the believer and nonbeliever are equal before the law and before all branches of government. If this Court now upholds the Ten Commandments display by the State of Texas, at issue here, the Court will then have to hand down precise guidelines for our nation, delineating where government can favor belief over nonbelief and where government cannot do so. This would be a painstaking task that requires the most minute analysis of every facet of all government actions that touch upon God or religion. It would be much more consistent with this Court's unbroken line of precedents to reverse the 5th Circuit and to declare as unconstitutional the display of the totality of the Ten Commandments—including all the instructions for showing the proper reverence for God and the Sabbath—by any branch of government, particularly at its seat of power, in a manner such as is the situation in Texas.

If branches of government can celebrate and promote Commandments that deal with exclusive worship of the Biblical God, in what other ways will this Court now allow government to favor belief over nonbelief and Biblical religion over non Biblical religion?

In what way, then, will branches of government be permitted to favor the believer over the nonbeliever? If any government body can show even the slightest preference for belief over nonbelief, this would violate everything the First

Amendment stands for. No branch of government can show any favoritism towards anyone, based upon that person's views on matters of religion. *Everson v. Board of Education of Ewing Tp.*, 330 U.S. at 15-16.

This Court has:

> unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects or even intolerance among "religions" to encompass intolerance of the disbeliever and the uncertain.

Wallace v. Jaffree, 472 U.S. 38, 53-54 (1985).

If branches of government can give prominence to displays of religious edicts, as "a recognition of the large role" of such edicts in the development of the prevailing legal system, *Van Orden*, 351 F.3d at 177, then government bodies can turn nonbelievers and religious dissenters into outsiders, which action—on the part of any facet of government—this Court has correctly held to be unconstitutional. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 309-310.

If this Court were to allow government authorities to dodge adhering to the requirement of government neutrality in matters of religion, mandated by the First Amendment, the counter majoritarian purpose of the Bill of Rights would be undermined. This Court has famously held:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of political

> majorities . . . One's right to...free speech . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

The First Amendment has a deep purpose of requiring government neutrality in all matters of religion, so as to not only preserve equal rights for both believers and nonbelievers but also to prevent the kind of internal strife that historically occurred within countries whenever the government was permitted to promote religion. As this Court has said:

> The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert of dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits.

School District of Abington Tp. v. Schempp, 374 U.S. 203, 222 (1963).

On what underlying, cohesive theory could a consistent constitutional doctrine be developed that would allow the government to openly promote the idea that our legal system is significantly undergirded by a set of edicts that prescribe the exclusivity of worshiping the Biblical God and how that God is to be shown respect, along with keeping the Sabbath day holy? How could such a practice not violate the clear Constitutional mandate that no branch of government can demonstrate favoritism for belief over nonbelief? There is no sound manner in which such a constitutional doctrine could be composed. This Court has clearly held that government cannot "place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general." *Texas Monthly v. Bullock*, 489 U.S. 1, 9 (1989).

As shown in Section I. of this Brief, James Madison, the initial principal author of the First Amendment, was heavily influenced by Thomas Jefferson in the quest to achieve a governmental system in which there would be no favoritism in favor of belief over nonbelief. Though Jefferson was in Paris at the time of the introduction into Congress of the First Amendment, he continued to influence Madison by way of correspondence. In 1787, one year after Jefferson and Madison successfully achieved passage in the Virginia Legislature of their Virginia Statue for Religious Freedom, Jefferson published his *Notes on Virginia*. The portion relevant here was written by him between 1782 and 1786. In *Query XVII* of the *Notes*, Jefferson wrote:

> The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are 20 gods, or no god. It neither picks my pocket nor breaks my leg.

The Works of Thomas Jefferson, Paul L. Ford, editor (Federal Edition), Volume IV, G.P. Putnam & Sons, London and New York, 1904-05, *Query XVII* found at: http://xroads.virginia.edu/~HYPER/JEFFERSON/toc.html

The scheme of the Framers was to create a governmental system in which not even the slightest government favoritism can be manifested in favor of religious belief over nonbelief. Once the Fourteenth Amendment made the Bill of Rights binding on the states, the Framers intentions now apply to every branch of government in the nation. No state should be permitted to hold up a religious document and suggest in any way that such a religious text is a founding pillar of that state's legal system.

No branch of government can "treat people differently based on the God or gods they worship or do not worship." *Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 714 (1994) (O'Connor, J. concurring.) Accordingly, no branch of

government should ever be permitted to declare that a series of religious edicts that prescribe the exclusivity of worship owing to the Biblical God are foundational components of the governing legal system. If any government body were to do so, the nonbeliever and religious dissenter would then be treated differently and their government would unconstitutionally communicate to them that they are outsiders and not a part of the official theological matrix that spawned the law of the land.

Rather than trying to cobble together such an internally inconsistent theory, the highest fidelity to the Constitution would be maintained by reversing the 5th Circuit and thereby reinforcing the proper constitutional principle that no branch of government can show any favoritism for the believer over the nonbeliever. This entails compelling all branches of government to refrain from officially displaying the totality of the Ten Commandments, including its instructions for worshiping the Biblical God, to the exclusion of any other deity, along with keeping the Sabbath day holy. The Ten Commandments display, at issue here, violates the Establishment Clause because it allows the State of Texas to give the impression that the state views its very legal system as grounded upon religious decrees.

CONCLUSION

Counsel of record; David Koepsell, J.D., PhD.; and David Musella, who helped edit this Brief; all wish to express our profound appreciation to this Supreme Court for considering the views of this *Amicus*.

Based on the foregoing, it is respectfully requested that this Court reverse the decision of the 5th Circuit Court of Appeals.

Respectfully submitted.

EDWARD TABASH *
LAW OFFICES OF EDWARD TABASH
8484 Wilshire Boulevard, #850
Beverly Hills, CA 90211
(323) 655-7506

* Counsel of Record

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